

PAUL BOSCHETTO, No C-06-1390 VRW  
Plaintiff, ORDER  
v  
JEFFREY D HANSING, FRANK BOUCHER  
CHRYSLER DODGE-JEEP, GORDIE  
BOUCHER FORD and BOUCHER  
AUTOMOTIVE GROUP,  
Defendants.

The complaint alleges a scenario that as far as the court can discern has been little dealt with in the published case law but which is bound to recur, perhaps with some frequency, in the years ahead. Plaintiff Paul Boschetto, a California resident, brought this diversity action against Wisconsin resident Jeffrey D Hansing and various Wisconsin car dealerships, Doc #1 (Compl), ¶¶ 1-4, alleging, inter alia, that Hansing committed breach of contract and fraud by selling plaintiff a defective 1964 Ford Galaxie in an Internet auction on eBay.com. Hansing and the Wisconsin dealerships have separately moved to dismiss this case

1 under FRCP 12(b)(2) for lack of personal jurisdiction. Doc ##4, 9.  
2 For the reasons stated below, the court GRANTS both motions.

3  
4 I

5 On August 1, 2005, plaintiff alleges that Hansing posted  
6 a 1964 Ford Galaxie for auction on eBay.com and that Hansing  
7 advertised the car as an "R Code" in "awesome condition," "recently  
8 rebuilt" and "ready to be driven." Compl, ¶ 6. Plaintiff contends  
9 that he relied on this description when submitting a bid of \$34,106  
10 and that eBay later notified him that his bid had succeeded. Id,  
11 ¶¶ 7, 8. After plaintiff paid for the car, Hansing instructed him  
12 by email that he could pick it up from Frank Boucher Chrysler Dodge  
13 Jeep, the Wisconsin dealership where Hansing worked. Id, ¶¶ 5, 10.  
14 Frank Boucher Chrysler Dodge Jeep and the other defendant  
15 dealerships apparently constitute a single automotive group. Doc  
16 #9-2, ¶ 2. Plaintiff hired a delivery company to transport the  
17 vehicle to California and received it on September 15, 2005.  
18 Compl, ¶¶ 11-12. Plaintiff then discovered that the vehicle was  
19 defective and was not an "R Code" as advertised. Id, ¶ 12.

20  
21 II

22 A plaintiff has the burden of establishing that the court  
23 has personal jurisdiction over a defendant. Doe v Unocal Corp, 248  
24 F3d 915, 922 (9th Cir 2001). In assessing a plaintiff's showing,  
25 the court may consider evidence presented in affidavits and other  
26 evidence procured during discovery. But when the court acts on the  
27 motion without holding an evidentiary hearing, as here, the  
28 plaintiff need only make a prima facie showing of jurisdictional

1 facts to withstand the motion to dismiss. Id. When not directly  
2 controverted, plaintiff's version of the facts must be taken as  
3 true and conflicts between the facts contained in the parties'  
4 affidavits should be resolved in favor of plaintiff. Id. The  
5 facts here are not in material dispute.

6 A federal court may exercise personal jurisdiction over a  
7 defendant when such jurisdiction comports with the law of the state  
8 in which the court sits and with the requirements of due process.  
9 Lee v City of Los Angeles, 250 F3d 668, 692 (9th Cir 2001).

10 "California [law] permits the exercise of personal jurisdiction to  
11 the full extent permitted by due process." Bancroft & Masters, Inc  
12 v Augusta Natl, Inc, 223 F3d 1082, 1086 (9th Cir 2000); Cal Code  
13 Civ Pro § 410.10. Due process requires a defendant to have certain  
14 minimum contacts with the forum state so that permitting the suit  
15 would not offend "traditional notions of fair play and substantial  
16 justice." International Shoe Co v Washington, 326 US 310, 316  
17 (1945) (quoting Milliken v Meyer, 311 US 457, 463 (1940)) (internal  
18 quotation marks omitted). A defendant's "conduct and connection  
19 with the forum state" must be such that the defendant "should  
20 reasonably anticipate being haled into court there." World-Wide  
21 Volkswagen v Woodson, 444 US 286, 297 (1980).

22 General jurisdiction is a type of personal jurisdiction  
23 that exists when a defendant has substantial or continuous and  
24 systematic contacts with the forum state. Bancroft & Masters, 223  
25 F3d at 1086. When such contacts exist, a defendant may be haled  
26 into court in that state "in any action, even if the action is  
27 unrelated to those contacts." Id. The standard for establishing  
28 general jurisdiction is "'fairly high,' and requires that the

1 defendant's contacts be of the sort that approximate physical  
 2 presence." Id (quoting Brand v Menlove Dodge, 796 F2d 1070, 1073  
 3 (9th Cir 1986)) (citation omitted).

4 Absent general jurisdiction, a court still may exercise  
 5 specific jurisdiction. The Ninth Circuit has established a three-  
 6 prong test for establishing specific jurisdiction:

- 7 (1) The non-resident defendant must purposefully  
 8 direct his activities or consummate some  
 9 transaction with the forum or resident  
 10 thereof; or perform some act by which he  
 11 purposefully avails himself of the privilege  
 12 of conducting activities in the forum,  
 13 thereby invoking the benefits and protections  
 14 of its laws;
- 15 (2) [T]he claim must be one which arises out of  
 16 or relates to the defendant's forum related  
 17 activities; and
- 18 (3) [T]he exercise of jurisdiction must comport  
 19 with fair play and substantial justice, i e  
 20 it must be reasonable.

21 Schwarzenegger v Fred Martin Motor Co, 374 F3d 797, 802 (9th Cir  
 22 2003). Although plaintiff bears the burden of establishing the  
 23 first two prongs, defendant bears the burden on the third prong.  
 24 See id.

#### 25 A

26 Plaintiff argues the court may have general jurisdiction  
 27 over Hansing if discovery shows that he previously sold other cars  
 28 to California residents. Doc #17-1 at 5. Although plaintiff does  
 not contest the Wisconsin dealerships' assertions that they are not  
 incorporated in California and have never sold an automobile there  
 (Doc #9-2, ¶¶ 4, 11), he nonetheless suggests that the dealerships'  
 website might be sufficient to establish general jurisdiction over  
 them. Doc #16-1 at 6.

1 Plaintiff's general jurisdiction arguments fail to  
2 persuade. Plaintiff admits that he "has no direct knowledge"  
3 whether either the Dealership or Hansing have 'continuing or  
4 systematic' contacts with the State of California." Id. Even if  
5 plaintiff could demonstrate past sales by Hansing to California,  
6 occasional sales to California residents are insufficient to create  
7 general jurisdiction. See Brand, 796 F2d at 1073. And plaintiff  
8 has not marshaled any evidence to contest the Wisconsin  
9 dealerships' assertion that they have never conducted any business  
10 in California via their website. Doc #9-2, ¶ 11. Accordingly,  
11 plaintiff has not satisfied the fairly high burden for establishing  
12 general jurisdiction.

## B

13  
14 Plaintiff's better argument, of course, is that the court  
15 may exercise specific jurisdiction over Hansing because he  
16 contracted to sell a car to a California resident. Doc #17-1 at 6.  
17 Further, plaintiff asserts that Hansing acted as the Wisconsin  
18 dealerships' agent and employee in selling the car, thereby  
19 permitting the court to exercise jurisdiction over them. Doc #16-1  
20 at 8; Compl, ¶ 5. Hansing's actions form the only asserted basis  
21 for exercising specific jurisdiction over the Wisconsin  
22 dealerships. This argument need not long detain us. Even if  
23 Hansing acted as an agent, which the dealerships dispute, he did  
24 not as will presently be explained, purposefully direct his actions  
25 toward California. Without that showing, the court cannot exercise  
26 jurisdiction over the Wisconsin dealerships.

27 //

28 //

1           Plaintiff argues that the Ninth Circuit's decision in  
2 Data Disc, Inc v Systems Technology Associates, 557 F2d 1280 (9th  
3 Cir 1977), militates in favor of finding personal jurisdiction over  
4 Hansing. Doc #17-1 at 6. But Data Disc is hardly instructive  
5 here. In that case, the court found personal jurisdiction because  
6 "at least some of the negotiations took place at the Data Disc  
7 plant in Sunnyvale, California \* \* \*." Id at 1284. To the  
8 contrary here, negotiations in this case took place only over the  
9 Internet and never physically occurred in California.

10           The parties do not indicate, nor has the court  
11 discovered, any California or Ninth Circuit case law addressing the  
12 propriety of exercising specific jurisdiction over a nonresident  
13 defendant based on a single online auction sale to a resident of  
14 the forum state. But generally, "the likelihood that personal  
15 jurisdiction can be constitutionally exercised [over an entity with  
16 a website] is directly proportionate to the nature and quality of  
17 commercial activity that [the] entity conducts over the Internet."  
18 Cybersell, Inc v Cybersell, Inc, 130 F3d 414, 419 (9th Cir 1997)  
19 (quoting Zippo Mfg Co v Zippo Dot Com, Inc, 952 F Supp 1119, 1124  
20 (WD Pa 1997)). This activity ranges from "a broad spectrum of  
21 Internet use on the one hand, and contacts with the forum on the  
22 other." Id at 417. Here, of course, the issue is not whether the  
23 court has personal jurisdiction over the intermediary eBay but  
24 whether it has personal jurisdiction over an individual who  
25 conducted business over eBay. Nonetheless, Cybersell provides a  
26 useful framework for determining whether Hansing's use of eBay  
27 constitutes sufficient minimum contacts with California to justify  
28 exercising personal jurisdiction.

1 In defining whether the defendant had sufficient minimum  
2 "contacts with the forum," Cybersell relies on CompuServe, Inc v  
3 Patterson, 89 F3d 1257 (6th Cir 1996). There, the Sixth Circuit  
4 found jurisdiction over defendant Patterson proper because he  
5 "electronically transmitted thirty-two master software files to  
6 CompuServe, which CompuServe stored and displayed to its  
7 subscribers. \* \* \* In effect, Patterson used CompuServe as a  
8 distribution center to market his software." Cybersell, 130 F3d at  
9 417 (summarizing CompuServe, 89 F3d at 1264). Additionally, the  
10 relationship "was intended to be ongoing in nature; it was not a  
11 'one-shot affair.'" Compuserve, 89 F3d at 1265.

12 In the present case, Hansing's contacts with the forum  
13 state are not nearly as repetitive or comprehensive as were  
14 Patterson's contacts in Compuserve. Although Hansing used eBay to  
15 market the automobile, eBay acted not as a "distribution center"  
16 but rather as a virtual forum for the exchange of goods. And the  
17 relationship between plaintiff and Hansing was exactly a "one-shot  
18 affair." While eBay is headquartered in California, this contact  
19 is irrelevant because this dispute only involves two eBay users and  
20 not eBay itself.

21 Exercising personal jurisdiction would be improper here  
22 because Hansing's actions were not purposefully directed at the  
23 forum state. Auction sales on eBay are "random" and "attenuated,"  
24 and "the choice of [the] highest bidder is \* \* \* beyond the control  
25 of the seller;" hence, an overwhelming majority of courts have held  
26 that an eBay seller does not purposefully avail himself of the  
27 privilege of doing business in a forum state absent some additional  
28 conduct directed at the forum state. See The Winfield Collection,

1 Ltd v McCauley, 105 F Supp 2d 746, 749 (ED Mich 2000); Metcalf v  
2 Lawson, 802 A 2d 1221 (NH 2002) (finding no personal jurisdiction  
3 over an eBay seller with no control over the ultimate winner and no  
4 ability to exclude buyers from specific jurisdictions); Karstetter  
5 v Voss, 184 SW 3d 396 (Tex Ct App 2006) (finding no personal  
6 jurisdiction over an eBay seller who rejected a buyer's offer to  
7 preempt the auction and instead let the bidding process conclude),  
8 Action Tapes, Inc v Ebert, 2006 US Dist LEXIS 4958 (ND Tex 2006)  
9 (finding no personal jurisdiction over an eBay seller where the  
10 traditional auction process was not altered or circumvented in any  
11 manner); United Cutlery Corp v NFZ, Inc, 2003 US Dist LEXIS 21664  
12 (D Md 2003) (finding no personal jurisdiction over an eBay seller  
13 whose manifested intent was to sell to the highest bidder).

14           Although research did indicate two opinions that diverge  
15 from the prevailing view, their analyses do not persuade the court.  
16 In Malcolm v Esposito, the dispute arose from a single eBay sale to  
17 a Virginia resident. 63 Va Cir 440, 446 (Va Cir Ct 2003).  
18 Nonetheless, the court found jurisdiction proper because defendants  
19 were commercial sellers with 213 sales on eBay and who represented  
20 that they had local, national and international eBay customers.  
21 Id.

22           This case is distinguishable because plaintiff does not  
23 allege that Hansing or the Wisconsin dealerships conducted business  
24 over eBay with any frequency. To the contrary, plaintiff marshaled  
25 no evidence to contest the dealerships' assertion that they have  
26 never conducted business in California via the Internet. Doc #9-2,  
27 ¶ 11.

28 //



1           In Tindall v One 1973 Ford Mustang, the dispute again  
2 arose from a single eBay sale. 2006 WL 1329168, \*1 (ED Mich 2006).  
3 The court found jurisdiction proper because in "selling the car to  
4 a Michigan resident, Defendants have transacted business in the  
5 state, giving this Court personal jurisdiction over them \* \* \*."  
6 Id at \*4.

7           While more factually analogous to this case, Tindall is  
8 not persuasive because the court provided no reasoning to support  
9 its aforementioned conclusion. While other courts at least  
10 recognize that the Internet and particularly an eBay transaction  
11 may alter the jurisdictional analysis, the Tindall court seemingly  
12 analogized the situation to a "phone call or written correspondence  
13 to the forum." Id (quoting General Motors Corp v Ignacio Lopez de  
14 Arriortua, 948 F Supp 656, 663 (ED Mich 1996)). The analogy is  
15 flawed because phone calls and written correspondence by nature  
16 must be specifically targeted to a resident of the forum, while an  
17 advertisement on eBay lacks such focus.

18           Looking to whether Hansing engaged in some additional  
19 conduct directed at the forum, the court finds that plaintiff has  
20 alleged none. Only after the auction and alleged fraud had been  
21 committed did Hansing learn that the car was California-bound and  
22 did he email plaintiff regarding delivery. Accordingly, the  
23 "nature and quality" of Hansing's conduct over the Internet are  
24 insufficient to permit exercising personal jurisdiction in  
25 California. Significantly, plaintiff -- not Hansing -- made the  
26 arrangements for pick-up of the vehicle in Wisconsin and dispatched  
27 the shipper to that state. Unlike the usual eBay transaction in  
28 which the seller arranges for shipment and sets in motion the

1 events that land the product in the buyer's locale, this case is  
2 different.

3           This fact alone, although important enough, does not  
4 warrant finding that the court lacks personal jurisdiction over  
5 Hansing. Perhaps a greater significance lies in what too easy a  
6 test of personal jurisdiction could do to Internet commerce of the  
7 kind involved here. Assume an eBay seller would be subject to  
8 personal jurisdiction simply by consigning an item to eBay that is  
9 bought by some denizen of a faraway forum. The friction on e-  
10 commerce of such a rule would slow the flow of transactions --  
11 perhaps significantly. No doubt, Boschetto suffers considerable  
12 inconvenience in going to Wisconsin to assert his claim. But he  
13 bought the car knowing it was in Wisconsin and chose to do so  
14 without an inspection by himself or a third party who could have  
15 been engaged for that purpose. Under the facts here, due process  
16 suffers no offense by holding that this court lacks personal  
17 jurisdiction over defendants.

18           C

19           Plaintiff alternatively requests that "limited discovery  
20 be allowed to determine whether Hansing had sufficient contacts to  
21 form the basis for jurisdiction" (Doc #17-1 at 7-8) and "to  
22 determine whether Hansing was acting as either the actual or  
23 ostensible agent for [the] dealership" (Doc #16-1 at 9). The court  
24 has broad discretion to permit or deny discovery to determine  
25 whether personal jurisdiction exists. See Data Disc, 557 F2d at  
26 1285 n1. Here, plaintiff merely speculates without any support  
27 that discovery might allow him to demonstrate that jurisdiction in  
28 //

1 California is proper. The court therefore DENIES plaintiff's  
2 request for discovery.

3  
4 III

5 Accordingly, the court GRANTS Hansing's motion to dismiss  
6 (Doc #4) and the Wisconsin dealerships' motion to dismiss (Doc #9).  
7 The clerk is DIRECTED to CLOSE the file and TERMINATE all pending  
8 motions.

9  
10 IT IS SO ORDERED.

11   
12 \_\_\_\_\_

13 VAUGHN R WALKER

14 United States District Chief Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28